CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 255

THE ELMHURST CEMETERY COMPANY OF JOLIET, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 255

THE ELMHURST CEMETERY COMPANY OF JOLIET, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	2
Exhibit "A"—Notice of deficiency	4
Statement	5
Answer	10
Statement of evidence	11
Caption	11
Testimony of Herbert W. Spencer	11
Colloquy	15
Order approving statement of evidence	16
Memorandum opinion, Goodrich, J.	16
Decision	18
Motion for additional findings of fact and to modify decision	19
Motion to have order denying motion for additional findings, etc. reviewed by full Board	23
Order denying full Board review	26
Notices of petition for review	27
Petition for review and assignments of error	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 25, 1936.

—8431-C

Page

Proceedings before United States Board of Tax Appeals—Continued.
Orders enlarging time for preparation of evidence and delivery of record to United States Circuit Court of Appeals 32
Præcipe for record 33
Certificates of clerks 34
Proceedings in U. S. C. C. A.; Seventh Circuit 37
Caption 37
Minute entry of hearing 37
Opinion, Evans, J. 38
Judgment 41
Memo. re filing petition for rehearing 41
Memo. re filing answer to petition for rehearing 41
Order denying petition for rehearing 42
Order staying mandate 42
Præcipe for transcript of record 43
Clerk's certificate 45
Order allowing certiorari 45

1 The Elmhurst Cemetery Co. of Joliet,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
Docket No. 58813.
Appearances:

For petitioner: J. F. Riordan, Esq.
For respondent: E. A. Tonjes, Esq.

DOCKET ENTRIES.

1931

May 29—Petition received and filed. Taxpayer notified. (Fee paid.)
June 1—Copy of petition served on General Counsel.
July 21—Answer filed by General Counsel.
July 31—Copy served—assigned General Calendar.

1933

Feb. 3—Hearing set March 7, 1933.
Feb. 16—Motion to place on Circuit Calendar for hearing in Chicago, Illinois, filed by taxpayer. 2/23/33 granted.

1934

Jan. 18—Notice of hearing at Chicago beginning March 5, 1934.
Mar. 16—Hearing had before Mr. Goodrich on the merits. 60 day letter filed. Appearance of J. F. Riordan filed. No briefs.
Mar. 31—Transcript of hearing of March 16, 1934 filed.
Dec. 4—Memorandum opinion rendered—E. J. Goodrich, Division 11. Judgment will be entered for petitioner.
Dec. 5—Decision entered—Edgar J. Goodrich, Division 11.

1935

Jan. 10—Motion for additional findings of fact and to modify decision filed by General Counsel. 1/26/35 denied.
Feb. 5—Motion to have order denying motion for additional findings of fact and to modify decision reviewed by the full Board filed by General Counsel.
Feb. 9—Order that "Motion to have order denying motion for additional findings of fact and to modify decision review by full Board" is denied, entered.

Mar. 2—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.
Mar. 16—Proof of service filed by General Counsel. (2)
Apr. 12—Motion for extension to 7/2/35 to complete and transmit record filed by General Counsel.
Apr. 12—Order extending time to 7/2/35 to prepare evidence and deliver record entered.
June 20—Motion for extension to Sept. 2, 1935 to complete and transmit record filed by General Counsel.
June 20—Order that time for preparation of evidence and transmission and delivery of record be extended to Sept. 3, 1935, entered.
Aug. 19—Agreed statement of evidence lodged.
Aug. 19—Praecipe filed with proof of service thereon.
Aug. 20—Agreed statement of evidence approved and ordered filed.
Aug. 31—Order enlarging time for transmission and delivery of record to Sept. 9, 1935, entered.

29. 2 UNITED STATES BOARD OF TAX APPEALS.

The Elmhurst Cemetery Company of Joliet,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 58813.

PETITION.

Filed May 29, 1931.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-4: HRL-60D) dated April 30, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation with principal office at East Washington Street, Joliet, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 30, 1931.

3. The taxes in controversy are income taxes for the calendar years 1926, 1927, and 1928, and for $2,694.30.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. Failure to allow 76.6 cents as the March 1st, 1913 value of the improved portion of the cemetery, per square foot.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner has shown actual sales of lots in the improved portion of the cemetery on or about March 1st, 1913, at an average price of at least 76.6 cents per square foot and contends that such sales establish the March 1st, 1913 value of the unsold lots.

(b) The Commissioner has used original cost plus improvements as the basis of value, which method we dispute, for the reason shown in (a), above.

3 (c) The petitioner has produced witnesses who have testified that the March 1st, 1913 value of the improved portion of the cemetery was at least 76.6 cents per square foot, and is prepared to prove the same by competent witnesses.

Wherefore the petitioner prays that this Board may hear the proceedings and decide that the lots in the improved portion of the cemetery had a value of 76.6 cents per square foot on March 1st, 1913.

THE ELMHURST CEMETERY COMPANY OF JOLIET,
By GEO. WARNER YOUNG,
President.

(Corporate Seal)

State of Illinois }
County of Will } ss.

GEORGE WARNER YOUNG, being duly sworn, says that he is the president of the petitioner corporation above named and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

GEO. WARNER YOUNG.
George Warner Young.

Subscribed and sworn to before me this 20th day of May, 1931.

CHRISTINE L. JENSEN,
Notary Public.

(Notary Seal)

My commission expires 1933.

4 NP-2-26-28

Mailed Apr. 30, 1931.
IT:AR:D-4
HRL-60D

The Elmhurst Cemetery Company of Joliet,
East Washington Street,
Joliet, Illinois.

Sirs:

You are advised that the determination of your tax liability for the years 1926, 1927 and 1928 discloses a deficiency of $2,694.30 as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926 and section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability for the years in which a deficiency is disclosed.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your returns by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870
HLB-3

5 STATEMENT.

IT:AR:D-4
HRL-60D

In re.: The Elmhurst Cemetery Company of Joliet,
East Washington Street,
Joliet, Illinois.

Tax Liability.

Years	Tax Liability	Tax Assessed	Deficiency
1926	$1,294.72	$117.40	$1,177.32
1927	344.43	None	344.43
1928	1,172.55	None	1,172.55
Totals	$2,811.70	$117.40	$2,694.30

Careful consideration has been accorded your protest dated February 5, 1930 in connection with the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge on December 10, 1930, also your protest dated April 11, 1931.

1926.

Net Income.

Net income reported		$ 2,869.61
Add:		
1. Cost of lots sold	$7,864.04	
2. Roads and fence	1,308.58	9,172.62
		$12,042.23
Less:		
3. Depreciation		451.72
Adjusted net income		$11,590.51

Explanation of Changes.

1. This adjustment is due to the 1913 value of 76.6 cents per square foot claimed by you which has been reduced to 23.96 cents per square foot. As the result of an investigation made by this office, it was found that the original cost of your

land was $65,000.00, making the cost $474.45 per acre which corresponds to about 1.1 cents per square foot. The fair market value as at March 1, 1913, of the improved area has, as the result of a conference held in the office of the internal revenue agent in charge at Chicago, Illinois, been placed at $79,-
6 458.55 which corresponds to a value of 13.7 cents per square foot, to which is added the cost of improvements, 10.26 cents per square foot, in arriving at the fair market value of 23.96 cents per square foot for land in the improved area. The records show that 14,939.30 square feet were sold in 1926, which at 23.96 cents per square foot results in a cost to be used of $3,579.46 instead of $11,443.50 and the disallowance of $7,864.04.

2. This item was included in the account "Road and Fence Maintenance" and represents an amount expended for a new iron post and wire fence, which this office has disallowed since it is held to be a capital expenditure. See article 292, Regulations 69.

3. It appears that no depreciation was claimed by you on your return and this office has allowed depreciation in accordance with exhibit attached. See article 161 of Regulations 69.

Computation of Tax.

Net income	$11,590.51
Less:	
Credit	2,000.00
Balance taxable at 13½%	$ 9,590.51
Tax at 13½%	$ 1,294.72
Total tax assessable	$ 1,294.72
Tax previously assessed	117.40
Deficiency	$ 1,177.32

1927.

Net Income.

Net loss reported		$ 1,367.21
Add:		
1. Cost of lots sold	$5,779.32	
2. Excessive depreciation	139.21	5,918.53
Adjusted net income		$ 4,551.32

7 Explanation of Changes:

1. This adjustment is of same character as item 1, under 1926 income adjustment.

Cost of lots sold, claimed	$ 8,409.89
Cost of lots sold, as corrected	2,630.57
Additional income	$ 5,779.32
2. Depreciation claimed	$ 745.28
Depreciation allowed	606.07
Excessive depreciation	$ 139.21

Depreciation has been allowed in accordance with exhibit attached.

Computation of Tax.

Net income	$ 4,551.32
Less:	
Credit	2,000.00
Balance taxable at 13½%	$ 2,551.32
Tax at 13½%	$ 344.43
Total tax assessable	$ 344.43
Tax previously assessed	None
Deficiency	$ 344.43

1928.

Net Income.

Net income reported		$ 2,414.17
Add:		
1. Cost of lots sold	$8,989.56	
2. 1927 net loss eliminated	1,367.51	10,357.07
Adjusted net income		$12,771.24

8 Explanation of Changes

1. This adjustment is of same character as item 1, under 1926 income adjustment.

Cost of lots sold, claimed	$13,081.33
Cost of lots sold, as corrected	4,091.77
Additional income	$ 8,989.56

2. The net loss for the year 1927 which was deducted on your return for 1928 has been eliminated, a net income having been determined for 1927 as shown above.

Computation of Tax

Net income	$12,771.24
Less:	
Credit	3,000.00
Balance taxable at 12%	$ 9,771.24
Tax at 12%	$ 1,172.55
Total tax assessable	$ 1,172.55
Tax previously assessed	None
Deficiency	$ 1,172.55

A copy of this communication has been furnished your representative, Mr. George G. Dunlap, 38 South Dearborn Street, Chicago, Illinois.

9 IT:AR:D-4
HRL-60D

EXHIBIT 1

The Elmhurst Cemetery Company of Joliet
Depreciation

Machinery and Equipment

Year	Month	Balance Close of Period	Additions	Rate	Amended Reserve December 31, 1925	Depreciation	Depreciation
1908 to 1915		$ 425.00	$ 425.00	10%	$ 425.00	—0—	—0—
1924	July	602.50	117.50	10%	27.62	$ 17.75	$ 17.75
1925	July	1,075.03	472.53	10%	23.62	47.25	47.25
1926	July	1,124.09	49.06	10%	—0—	2.45	4.90
1927	July	1,768.64	644.55	10%	—0—	—0—	32.22
Totals					$ 476.24	$ 67.45	$ 102.12

EXHIBIT 2

Buildings

1913	March	$7,457.69	$7,457.69	4%	$3,828.31	$ 298.30	$ 298.30
1926	July	8,485.27	1,027.58	4%	—0—	20.55	41.10
1927	July	9,621.59	1,136.32	4%	—0—	—0—	22.72
Totals					$3,828.31	$ 318.85	$ 362.12

EXHIBIT 3

Office Furniture and Fixtures

1913	—	$ 75.00			$ 75.00	—0—	—0—
1927	July	294.63	$ 219.63	10%	—0—	—0—	10.98
Totals					$ 75.00	—0—	$ 10.98

EXHIBIT 4

Fence

1926	July	$1,308.58	$1,308.58	10%	—0—	$ 65.43	$ 130.85

Depreciation Summary

	To December 31, 1925	1926	1927
Exhibit 1	$ 476.24	$ 67.45	$ 102.12
Exhibit 2	3,828.31	318.85	362.12
Exhibit 3	75.00	—0—	10.98
Exhibit 4	—0—	65.42	130.85
Totals	$4,379.55	$ 451.72	$ 606.07
Debits to reserve	—0—	—0—	—0—
	$4,379.55	$4,831.27	$5,437.34
Total depreciation allowed as amended		$ 451.72	$ 606.07
Total depreciation claimed		None	745.28
		$ 451.72	($139.21)

21. 10 UNITED STATES BOARD OF TAX APPEALS

* * (Caption—58813) * *

ANSWER

Filed Jul 21 1931

The respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer filed May 29, 1931, admits and denies as follows:

1. Admits the allegations contained in paragraph No. 1.
2. Admits that the notice of deficiency was mailed to the petitioner on April 30, 1931, and denies the remainder of paragraph No. 2.
3. Admits the allegations contained in paragraph No. 3.
4. Denies that the respondent erred in determining or computing petitioner's tax liability for the calendar years 1926, 1927 and 1928, as alleged in subparagraph 1 of paragraph No. 4.
5. Denies the allegations contained in subparagraphs (a), (b) and (c) of paragraph No. 5.
6. Denies generally and specifically each and every allegation not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
BRUCE A. LOW,
Special Attorney,
Bureau of Internal Revenue.

35 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
v.
The Elmhurst Cemetery Company of Joliet,
Respondent.
} Docket Number 58813

STATEMENT OF EVIDENCE.

Lodged Aug. 19, 1935.

Filed Aug. 20, 1935.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable Edgar J. Goodrich, Member of the United States Board of Tax Appeals, on the 16th day of March, 1934. J. F. Riordan, Esq., appeared for the petitioner, and E. A. Tonjes, Special Attorney, Bureau of Internal Revenue, appeared for the respondent.

HERBERT W. SPENCER was called as a witness on behalf of the petitioner, and having been duly sworn, was examined and testified as follows:

That his occupation is that of Superintendent of The Elmhurst Cemetery Company. He has been engaged as superintendent since 1913. That he was connected with the Elmhurst Cemetery Company since its organization in 1909; that
36 he is familiar with the property and was familiar with the property on March 1, 1913; that he was familiar with the sales prices of burial lots in the cemetery on March 1, 1913; that the property of The Elmhurst Cemetery Company consisted of 137 acres which was acquired in 1909 at a cost of $60,000; that between the year 1909 and March 1, 1913, the north 37 acres were developed for cemetery purposes. The development consisted of the construction of roads and drives and some pools. The property was leveled off where it was

uneven, and flowers, trees and shrubs were planted. That the
21. cost of the development prior to 1913 was approximately $35,000.00.

It was thereupon, by agreement of counsel, stipulated and agreed that during the year 1909, 7,308.55 square feet were sold at a total price of $5,339.80; during the year 1910, 7,005.55 square feet were sold for a total price of $5,013.71; during the year 1911, 7,312.20 square feet were sold and the amount received therefor was $5,133.95; during the year 1912, 6,320.20 square feet were sold and the amount received therefor was $4,837.39; during the year 1913, there were sold 8,506.10 square feet and the amount received therefor was $6,763.50. The total number of square feet sold during the years 1909 to 1913, inclusive, was 36,452.60 square feet. The amount received therefor was $27,090.35, or an average price per square foot of 74.03 cents. On February 15, 1913, 24 square feet were sold for $10.00; on March 5, 1913, 48 square feet were sold for $50.00; on March 13, 1913, 96 square feet were sold for $75.00; on March 14, 1913, 144 square feet were sold for $111.00. The aggregate sales in square feet is 312, and the amount re-
37 ceived therefor is $264.00, or an average price of 78.08 cents per square foot.

(This concludes the stipulated facts).

During the year 1914, the average price per square foot received by The Elmhurst Cemetery Company for lots sold was 75.6 cents; in the year 1915, 78.1 cents a square foot; in 1916, 80 cents a square foot. During the year 1926, the Elmhurst Cemetery Company sold its burial lots at the rate of $1.55 a square foot; during the year 1927, at the rate of $1.66 a square foot, and in 1928, the average price was $1.77 a square foot. During the year 1926, 14,939.3 square feet of lots were sold; during the year 1927, 10,979 square feet; and in the year 1928, 17,077.5 square feet.

Based on my experience in the cemetery business, it is a fact that as the number of lots remaining unsold decreases, the unsold lots increase in price. I have attended meetings of cemetery men at conventions where matters of this kind were discussed and so far as I have heard, the experience of cemetery men is that lots increases up to a certain point of saturation; it increases for years after the cemetery is organized.

In response to inquiry by the presiding Member, the witness testified as follows:

The sales of burial lots made in 1913 and in 1912 were made

in the normal course of business, and were not the result of a particular advertising campaign or promotion campaign which was going on at that time. We made no extra effort to sell lots at that time at all. The purchase price was es-
38 tablished by my visiting a good many cemeteries that I figured were practically of the same class as that cemetery and situated near cities of about the same population, and I established a price from the price they were selling at. The value of the cemetery is the number of lots you have to a large extent.

The sales of lots in 1912 and 1913 were made by people just coming out, and I sold the lots, nearly all of them. Once in a while the sexton would sell a lot. I simply took them out there and if they wanted to pay, they paid. We sold on time, and for cash, any way they could afford to pay, and I fixed the price. There was a slight rise after March 1, 1913 so that the total average for the year 1913 showed a little higher than the year. 1912—March 1, 1912 to March 1, 1913, the average is 79.5 cents for the year, the fiscal year, while it is 77.6 for the calendar year, the price we contend is the fair market value for March 1, 1912 to March 1, 1913. The average sale price in 1911 was 70.2 cents a square foot. In 1910, the average was 71.5 cents. The discrepancy was caused by selling more square feet in one of the sections that was higher priced than one of the other sections, the size of the lots were anywhere from 150 to 1,500 square feet. That is, outside of the sales of single graves. The standard of a single grave is 24 feet. The lots sold by The Elmhurst Cemetery Company during the years 1926, 1927 and 1928 were owned by the Elmhurst Cemetery Company on March 1, 1913 and they were in substantially the same condition with respect to development.

39 On cross-examination, Mr. Spencer testified as follows:

It would take approximately 50 or maybe 60 years to sell the lots in the improved section of the cemetery. I do not mean that possibly every grave but the bulk of it could be disposed of in 60 or 70 years. In response to a question as to whether the witness meant from the date of trial or 1913, the witness testified—I mean from now. I think that it is possibly too conservative—it might come nearer to 75 years, it would depend largely upon the growth of the community. Every grave and lot in the cemetery sold since its organization is under perpetual care, and when perpetual care is pro-

vided, it means keeping the roads and drives in proper repair, keeping the drainage system in proper repair, keeping the fences in repair, cutting the grass, pruning the trees, shrubs, and keeping it in good condition. It is difficult to say how much it would cost to maintain the cemetery a year, that is, the roads, shrubbery, etc., for the simple reason that it costs more in some years than it does in others. For instance, in a certain year you might have to do extensive repairs; you might make extensive repairs to your drainage at some time, but I would say that it would cost about $4,000.00 a year. You see we cut the grass as high as 37 times in one season—in two years we cut the grass 37 times, but last year we cut it only 28 times because we had such a dry season. If a purchaser desires to buy a lot, he would call at the office and see either the sexton or myself. I draw a salary of $2,400.00 a year. In 1913 I did not draw a salary. I did not draw a salary until 1925. The corporation does not make any contributions to churches or fraternal organizations. The cemetery has on occasion paid 10% commission to undertakers.

Based on the fact that the record shows that the average sales for the years 1909 to 1913 are slightly over 7,000 square feet, I would say that a fair expectancy of sales of burial lots for the entire year 1913 would be between 7,000 and 7,500 square feet.

We hoped for a gradual increase in sales every year because as a general rule, for every head of a family that is buried you secure four new families. That is a rule cemetery companies have adopted.

On redirect examination, the witness testified—I received a salary of $2,400 per annum and I devoted about 10% of my time to the sale of lots. The sexton would also spend about 10% of his time in the sale of lots. The average expense of just taking care of the grounds was about $4,000 a year, such as cutting grass and things like that would at least be $4,000 a year but some years it would be more than that. This is an operating expense and has income to offset that expense. There is income from interments, planting flowers, perpetual care of flowers, when we plant flowers for people that order them, and furnish the flowers and things like that. With reference to the probable length of time it would require to dispose of all of the lots in the developed portion of the cemetery it would take 50 or 60 years from

1934; it is just an estimate, it would depend largely upon
41 the population of the surrounding communities, etc. I arrived at the value of 76.6 cents a square foot by taking the average value of lots sold from March 1, 1912 to March 1, 1913.

After brief oral argument by both counsel, the following colloquy took place:

The Member: That is true. By the record, so far as I have it here, it shows a small but apparently steady increase from year to year. Can you give me any light, Mr. Tonjes, on the basis that the respondent made his valuation?

Mr. Tonjes: Yes, your Honor, I have a report here which was made by the engineer which I will gladly submit to the Court, if the petitioner has no objection.

Mr. Riordan: I think it would be prejudicial to the petitioner's case to permit that to go into evidence when he is not here to be cross-examined.

Mr. Tonjes: That is purely for the purpose of showing how he got that value.

The Member: You say one of the respondent's engineers made a valuation of this thing?

Mr. Tonjes: Yes, that is the cost over the prospective time of sale, reduced to present value.

The Member: Does this report indicate or consider in any way the value of other cemetery properties in or about Joliet?

Mr. Tonjes: No.

The Member: It is simply the discount method of arriving at the valuation.

Mr. Tonjes: Yes.

The Member: Based on cost?

Mr. Tonjes: Costs, improvements, etc.

The Member: I will take this under advisement; I will have to look at the cases involving cemetery valuation.

42 The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

(Sd) LAWRENCE GRAVES
Attorney for the
Respondent on Review

(Stamp) Approved and ordered filed this 20 day of Aug., 1935. (S) C. R. Arundell Member.

The foregoing is all of the material evidence adduced at the hearing in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this ..... day of ....., 1935

.....
Member, United States
Board of Tax Appeals.

11 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

J. F. Riordan, Esq., for the petitioner.

E. A. Tonjes, Esq., for the respondent.

MEMORANDUM OPINION.

Goodrich: Respondent determined, and petitioner contests, deficiencies in income tax for 1926 of $1,177.32; for 1927 of $344.43; and for 1928 of $1,172.55.

There is but one issue for our decision, namely, what was the fair market value as of March 1, 1913, (which is to be used as cost basis in this case) of the grave plots sold by petitioner during the years here under review? Petitioner reported and here contends that the value was not less than 76.6c a square foot. Respondent refused to accept that value,
12 and determined that the value was 23.96c a square foot. (Both figures take into account expenditures for improvements.) Respondent's use of a lower value than that reported, results in his disallowance of a part of the cost basis in determining the gain upon sales made by petitioner, and, in turn, from that action result the deficiencies here in controversy.

Aside from the question of valuation, the material facts are not disputed. Petitioner is a corporation with its principal office in Joliet, Illinois. About 1909 it purchased 137 acres of land in or about Joliet, which it has since owned and operated as a cemetery. The cost of the tract was $60,000 (according to the testimony: $65,000 according to respondent's deficiency notice). Petitioner improved the north 37 acres of its lands by landscaping, laying out roads, constructing pools, and leveling, all at a cost of about $35,000. From the acreage so improved its sales of grave plots have since been made.

Sales each year from 1909 to 1913, inclusive, and the average selling price per square foot were as follows:

1909	7,308	sq. ft. at	73c
1910	7,005.55	sq. ft. at	71.5c
1911	7,312.20	sq. ft. at	70.2c
1912	6,320.20	sq. ft. at	77.6c
1913	8,506.10	sq. ft. at	79.5c
1913—Month of March	312	sq. ft. at	78.08c

During the years here under review the footage sold and the average selling price were:

1926	14,939.9	sq. ft. at	$1.55
1927	10,979	sq. ft. at	1.66
1928	17,077.5	sq. ft. at	1.77

13 While the issue is not clearly drawn, it is apparent from respondent's deficiency notice, and from the trial record, that the parties are now concerned only with the value as of March 1, 1913, of that 37 acres of petitioner's lands which have been improved and from which sales have been made. Respondent has made no determination as to the value of the unimproved area; and concerning it petitioner makes no claim, offers no proof. We cannot from the record before us make any finding as to the basic value of the unimproved land and perforce are directed only to the limited issue respecting the improved area.

As to the basic value of the improved land, there is a wide difference between the parties. Beyond statements of counsel to the effect that respondent has attempted by formula to reduce the value of the improved land as of March 1, 1913, to present value, we are uninformed as to the method by which he chose the figures at which he fixes the basis for determining gain. Petitioner, however, has chosen as the footage valuation as of March 1, 1913, the selling price of its grave lots

during the year just preceding that date—76.6c—which is less than the average sales price during the month of March 1913.

We are of opinion that the valuation for which petitioner contends is reasonable and should be allowed. It is based upon actual sales, and consequently comes as closely as may be to that fair market value, so often judicially defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. S. M. 1428, C. B. IV-I-101; *Fairmount Cemetery Association,* 25 B. T. A. 1272.

Judgment will be entered for the petitioner.

Entered Dec. 4, 1934.

:c. 5. 14 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered December 4, 1934, it is

Ordered and Decided: That there are no deficiencies for the years 1926, 1927 and 1928.

Enter:

(Signed) EDGAR J. GOODRICH,
Member.

(Seal)

Entered Dec. 5, 1934.

15 UNITED STATES BOARD OF TAX APPEALS. Filed 1935

* * (Caption—58813) * *

MOTION FOR ADDITIONAL FINDINGS OF FACT AND TO MODIFY DECISION.

Filed Jan. 10, 1935.

Denied Jan. 26, 1935.

(Signed) EDGAR J. GOODRICH,
Member.

Now Comes the respondent, by and through his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully shows to this Honorable Board—

That the above-entitled appeal was heard at Chicago, Illinois, before Hon. Edgar J. Goodrich;

That the issue involved is—what was the fair market value as of March 1, 1913 of the grave plots sold by the petitioner during the years 1926, 1927 and 1928;

That on December 4, 1934 the Board promulgated its findings of fact and opinion and entered its decision that there are no deficiencies for the years 1926, 1927 and 1928 on December 5, 1934;

That Mr. Herbert W. Spencer, a witness on behalf of the petition, testified at the hearing as follows:

By Mr. Tonjes: Q. Mr. Spencer, how long do you estimate it would take the cemetery company to dispose of the lots, that is the improved portion of the cemetery?

A. Well, that is a hard question to answer, but I would say roughly 50 years, 60 years, maybe, the improved section. That is, when I say that, I do not mean that possibly every grave, but the bulk of it would be disposed of in 60 or 70 years.

16 Q. That is, you mean now, or 1913?

I mean from now. I think that is possibly too conservative. It might come nearer to 75 years; it would depend largely upon the growth of the community. Record 14.

Q. With reference to the probable length of time that would be required to dispose of all of the lots in the developed portion of the cemetery, you testified it would take over 50 years or 60 years; from 1934?

A. Yes, that would be my estimate; it is just an estimate.

It would depend largely upon the population of the surrounding communities, etc. Record 23 and 24.

Q. How were the lots sold? Did you have any agreement in 1913 to keep the cemetery in any particular degree of appearance?

A. Well, every lot and grave in the cemetery is under perpetual care, and when perpetual care is provided, it means keeping the roads and drives in proper repair, keeping the drainage system in proper repair, keeping fences in repair, cutting the grass, trimming the trees and shrubs, and keeping it in good condition generally.

Q. That system of selling lots was also in effect in 1913, was it?

A. Yes, ever since the organization.

Q. About how much does it cost to maintain the cemetery a year, that is the roads, the shrubbery, etc.?

A. Well, that is a little difficult to say, for the simple reason it costs more some years than it does others. For instance, in a certain year, you might have to do expensive repairs; you might have expense repairs to do in your drainage, at some time.

Q. What, to the best of your knowledge would be a fair estimate?

A. We got this in—the original 37 acres I would think it would cost around $8,000, $7,000, $8,000 or $9,000.

Q. I did not have in mind the total improvements, Mr. Spencer, I had in mind—

A. No, you mean operating costs.

Q. I mean yearly upkeep, just keeping the park, the burial park, in what we call a respectable condition, not the total outlay?

A. You do not mean labor, you mean for—just for the—

17 Q. Now, just the expenses for which you do not get any direct compensation.

A. $4,000, I would say it cost about $4,000.

Q. From 1913 to date?

A. Probably that.

Q. How much a year would you pay?

A. How is that?

Q. About how much per year?

A. I would say about $4,000 per year.

Q. I see.

A. You see, we cut the grass as high as 37 times in one sea-

son; in two years we cut the grass 37 times, but last year we only cut it 28 times because we had such a dry season. Record 14, 15 and 16.

Q. Mr. Spencer, the record shows that the average sales for the years 1909 to 1913 are slightly over 7,000 feet; based on that showing, what would you say would be a fair expectancy of sales of burial lots for 1913, the entire year, how many square feet would you reasonably expect to dispose of, based on what knowledge you had at the time?

* * * * * *

Q. Well, I would have been fairly satisfied if it had been 7,000 or 7,500. Record 18 and 19.

It is therefore, respectfully requested that the Board find the following additional facts, none of which were found by the Board in its finding of fact and opinion:

That—"It would take 75 years from March 1, 1913 for the petitioner to dispose of the lots in the improved portion of the cemetery."

That—"It would cost the petitioner approximately $4,000 a year to maintain the cemetery in a condition so as it would be suitable for burial purposes."

That—"Based on the information available at March 1, 1913 the petitioner had a fair expectancy of disposing of between 7,000 and 7,500 square feet of burial lots during the year 1913."

The respondent respectfully urges that the decision of
18 the Board to the effect that the burial lots sold by the petitioner during the taxable years had a value of 76.6 a square foot is erroneous, and in support thereof, submits the following:

That the Board has failed to take into consideration the fact that the petitioner had an expectancy of selling only 7,500 square feet of its property a year at March 1, 1913, and that it would take 75 years to dispose of the available burial lots in the improved portion of the cemetery. In other words, the Board has failed to take into consideration the fact that the average sale of undisposed lots of petitioner is approximately 37 years after March 1, 1913.

That the Board in the case of the Fairmount Cemetery Association, reported in 30 B. T. A. No. 114, lays down the rule to be applied in determining the fair market value as of March 1, 1913, of cemetery properties—

"* * * The meaning of fair market value is well fixed. It is what property can be sold for at a given date in a trans-

action in which vendor and vendee are equally free to act. It is true that petitioner has proved some sales of improved lots about two years before March 1, 1913, at prices approximating the values here claimed. The record discloses, however, that at the basic date the land owned by petitioner was sufficient to supply all its demands for burial lots for 200 years. The appraisal of 78 cents per square foot and the expert evidence offered in connection therewith by the petitioner ignores this situation. If it be assumed that all the lots on hand would be sold over a period of 200 years, it follows that on an average the receipt of the sales price by the petitioner would be deferred for 100 years. It would then become necessary to determine the present worth of $34,000, the value per acre claimed in 1913, but not realizable until 2013, which at a discount rate of 6 percent, would be $100.20".

That this appeal of the *Fairmount Cemetery Association,* reported in 30 B. T. A., clearly overrules the case of the *Fairmount Cemetery Association, reported in* 25 B. T. A. 1272, which is relied on by the Board as authority for its decision.

19 Wherefore, it is respectfully prayed that the Board find the additional facts set forth above, and that the Board modify its decision by giving consideration to these facts and to apply the method of determining the March 1, 1913 value of the cemetery lots in the manner consistent with the Appeal of Fairmount Cemetery Association, reported in 30 B. T. A. No. 114.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
E. A. TONJES,
Special Attorney, Bureau of Internal Revenue.

eat-k 1-8-35

20 UNITED STATES BOARD OF TAX APPEALS. Filed 1 1935

* * (Caption—58813) * *

MOTION TO HAVE ORDER DENYING MOTION FOR ADDITIONAL FINDINGS OF FACT AND TO MODIFY DECISION, REVIEWED BY THE FULL BOARD.

Filed February 5, 1935.

Now Comes the respondent, by and through his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully shows to this Honorable Board: That the above-entitled appeal was heard by the Honorable Edgar J. Goodrich, at Chicago, Illinois, on March 16, 1934. The question presented is, what was the fair market value as of March 1, 1913 of the grave lots sold by the petitioner during the years 1926, 1927 and 1928. On December 4, 1934, the Board promulgated its findings of fact and opinion. On December 5, 1934, it entered its order that there are no deficiencies for the years 1926, 1927 and 1928.

The Board found as a fact, and the respondent agrees, that the average sales of grave lots during the year just preceding March 1, 1913 was at a price of 76.6 a square foot. The Opinion of the Board reads in part as follows:

"We are of the opinion that the valuation for which petitioner contends is reasonable and should be allowed. It is based upon actual sales, and consequently comes as closely as may be to that fair market value, so often judicially
21 defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. S. M. 1428, C. B. IV—I-101; *Fairmount Cemetery Association*, 25 B. T. A. 1272."

It will be noted that the Board bases its opinion on the case of the Fairmount Cemetery Association, 25 B. T. A. 1272. However, in a more recent case of the Fairmount Cemetery Association, which is reported in 30 B. T. A. #114, the Board lays down a different rule than that used in the case reported in 25 B. T. A., to be applied in determining the fair market value of cemetery properties as of March 1, 1913.

The Board in the latter case, said:

"* * * The meaning of fair market value is well fixed. It is what property can be sold for at a given date in a transaction in which vendor and vendee are equally free to act. It is true that petitioner has proved some sales of improved lots about two years before March 1, 1913, at prices approximating the values here claimed. The record discloses, how-

ever, that at the basic date the land owned by petitioner was sufficient to supply all its demands for burial lots for 200 years. The appraisal of 78 cents per square foot and the expert evidence offered in connection therewith by the petitioner ignores this situation. If it be assumed that all the lots on hand would be sold over a period of 200 years, it follows that on an average the receipt of the sales price by the petitioner would be deferred for 100 years. It would then become necessary to determine the present worth of $34,000, the value per acre claimed in 1913, but not realizable until 2013, which at a discount rate of 6 per cent, would be $100.20".

Based on the rule laid down by this decision, clearly the number of years it will require the cemetery to dispose of all of the burial lots in the property to be valued is material to the question of what the value of such property is, and
22 therefore it is the respondent's contention that if the evidence shows what this period of time is, the Board is bound to find what it is as a fact.

The Board in its findings of fact and opinion makes no such finding, and in order to correct this omission, respondent on January 10, 1935, filed a motion with the Board praying that the Board find additional facts and that its decision be modified. In this motion the respondent sets forth testimony upon which he relies in support of the motion. The motion, however, was denied by the Member who rendered the opinion, without comment.

The testimony quoted unquestionably establishes the fact that it would take 75 years from March 1, 1913 for the cemetery to sell all of its burial lots and that based on the information available at March 1, 1913, the petitioner had an expectancy of disposing of between 7,000 and 7,500 square feet of burial lots during the year 1913. In other words, the evidence shows that the market is limited and that the petitioner could not sell all of its lots at the price some were sold.

Based on the decision of the Board in the case of *Fairmont Cemetery Association,* 30 B. T. A. #114, the Board itself puts the stamp of materiality on the fact that a cemetery company cannot dispose of all of its burial lots immediately, but that it would take a number of years to do so. The evidence in the record on this point is uncontradicted. The only witness on behalf of the petitioner testified both on cross-examination and redirect examination that it would take the
23 petitioner 75 years from March 1, 1913, to sell all of its burial lots. Why the motion of the respondent, asking the Board to find facts which the record unquestionably establishes, and which the Board itself has found to be material

in determining the value of this type of property, was denied, is difficult to understand.

The question here to be decided is what is the fair market value of the cemetery lots which the petitioner sold during the taxable years. Clearly, the market value means what a thing can be sold for, and when, as in this case, the testimony clearly shows that the market is not a present market, but a market in the mean 37 years hence, the fact that the market is 37 years hence is material and the Board should find so as a fact.

A view of the case as a whole shows the absuridity of the Board's determination of the value. The property acquired in 1909 cost, together with improvements, less than $1,500 an acre. The Board's value, however, as of March 1, 1913, less than five years from its acquisition, is in excess of $30,000 an acre.

The testimony that all the lots could not be sold for 75 years came from the petitioner's witness—but surely this does not mean that it is to be ignored if it is not to the petitioner's benefit. *L. Schepp,* 25 B. T. A. 419. There is nothing equivocal or ambiguous about the testimony. The witness was president of the petitioner and certainly was qualified to testify.

24 In conclusion, the respondent submits that the record contains conclusive evidence proving that the cemetery property would not be sold for 75 years from March 1, 1913; that it is material to the determination of the value of the lots in question to find as a fact over how long a period such lots will be sold, that the decision upon which the Board relies to support its opinion has been overruled; that the contentions of the respondent are in harmony with the last word on the subject by the Board (*Fairmont Cemetery Association,* 30 B. T. A. #114), and accordingly the respondent's motion for a further finding of fact and modification of the opinion and decision of the Board, should be reviewed by the full Board.

Wherefore, it is prayed that this motion be granted, and the motion filed by respondent on January 10, 1935, be allowed.

(Signed) ROBERT H. JACKSON
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
E. A. TONJES,
Special Attorney,
Bureau of Internal Revenue.

eat-k 1-31-35

Feb. 9. 25 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER DENYING BOARD REVIEW.

On December 4, 1934, the Board entered it memorandum opinion in this proceeding and on December 5, 1934, entered a decision in pursuance thereof deciding that there are no deficiencies for the years 1926, 1927, and 1928.

On January 10, 1935, respondent filed "Motion for Additional Findings of Fact and to Modify Decision." This motion was denied on January 26, 1935, by the Division Member who entered the memorandum opinion and decision above referred to.

On February 5, 1935, respondent filed "Motion to Have Order Denying Motion for Additional Finding of Fact and to Modify Decision, Reviewed by the Full Board," which motion has come to the Chairman for consideration.

Only Division reports which form the basis for the entry of the final decision in the proceedings are referred to the full Board of review under the rules of the Board and the applicable statutes. Such a report was the memorandum opinion entered by Division Member Goodrich, December 4, 1934. Orders by Division Members on motions such as respondent's "Motion for Additional Findings of Fact and to Modify Decision" are not under the rules of the Board and the applicable statutes, referred to the full Board for review. The Chairman's authority to refer reports of Divisions of the Board to the full Board for review is found in section 906 (b) of the Revenue Act of 1924 as amended in section 601 of the Revenue Act of 1928, which section 906 (b) as amended, reads as follows:

26 "(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board."

Accordingly, respondent's "Motion to Have Order Deny-

ing Motion for Additional Findings of Fact and to Modify Decision, Reviewed by the Full Board" is hereby Denied.

(Signed) EUGENE BLACK,
Chairman.

Dated: Washington, D. C., February 9, 1935.

33 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—58813) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Mar. 16, 1935.

United States Board of Tax Appeals.

Elmhurst Cemetery Company,
East Washington Street,
Joliet, Illinois.

You are hereby notified that the Commissioner of Internal Revenue, did, on the 2nd day of March, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of March, 1935.

(Sgd) GEO. WARNER YOUNG,
Respondent on Review.

34 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—58813) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Mar. 16, 1935.

United States Board of Tax Appeals.

J. F. Riordan, Esq.,
134 South La Salle Street,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue, did, on the 2nd day of March, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 4th day of March, 1935.

(Sgd) J. F. RIORDAN,
Attorney for the Respondent on Review.

27 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—58813) * *

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

Filed Mar. 2, 1935.

United States Board of Tax Appeals.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant At-

torney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and E. A. Tonjes, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner on review (hereinafter referred to as the Commissioner), is duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is a corporation organized and existing under the laws of the State of Illinois, and has its principal office on East Washington Street, Joliet, Illinois, and filed its income tax returns for the years 1926, 1927 and 1928 with the Collector of Internal Revenue for the First Illinois District, which said collection district is located within the Seventh Judicial Circuit of the United States.

28 II.

The nature of the controversy is as follows:

The petitioner in 1909 purchased approximately 137 acres of land near Joliet, Illinois, which was all dedicated to cemetery purposes and since then operated as a cemetery. 37 acres of the 137 acres were developed and made suitable for burial purposes by landscaping, laying of roads, constructing pools and leveling.

During the years 1926, 1927 and 1928, the petitioner sold 14,939, 10,979 and 17,077 square feet respectively, of its property for burial lots.

The Commissioner in determining the income tax liability of the taxpayer for the years 1926, 1927 and 1928, used as a basis for determining the gain on such sales of burial lots, a March 1, 1913 value of ~~14.4~~ cents a square foot, and by a notice of deficiency dated April 30, 1931, proposed for assessment deficiencies in income tax for the respective years, the amounts of $1177.32, $344.43, and $1172.55. From this determination of the Commissioner, the taxpayer appealed to the United States Board of Tax Appeals, contending that the fair market value at March 1, 1913, of the improved portion of the cemetery was 76.6 cents a square foot.

The appeal was heard at Chicago, Illinois, on March 16, 1934. It was established at the hearing that the average sell-

ing price of the grave lots sold during the four years preceding March 1, 1913 was 76.6 cents a square fot. The Board found this to be the fair market value to be used as a basis
for determining the gain on the sales of burial lots made
29 by the taxpayer during the years in question, and on
December 5, 1934, ordered and decided that there are no deficiencies for the years 1926, 1927 and 1928.

The record also contains uncontradicted testimony that based on the information available at March 1, 1913, the taxpayer had an expectancy of disposing of 7,000 to 7,500 square feet of burial lots during the year 1913, and that it would take the taxpayer 75 years from March 1, 1913, to dispose of all of its burial lots in the improved portion of the cemetery. The Board of Tax Appeals in its Memorandum Opinion dated December 4, 1934, failed to find either of these facts. Thereafter, the Commissioner filed a motion with the Board requesting the Board to find such additional facts, which motion was denied by the Board of Tax Appeals on January 26, 1935.

III.

The Commissioner now says that in the record and proceedings before the United States Board of Tax Appeals and in the findings of fact, opinion and decision promulgated and entered by said Board, manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner says the following errors and each of them, which he avers occurred in said record, proceedings, findings of fact, opinion and decision, upon which he relies to reverse the said findings of fact, opinion and decision so rendered and entered by the United States Board of Tax Appeals, to wit:
by the United States Board of Tax Appeals, to wit:
30 1. The Board of Tax Appeals erred in not holding and deciding that the fair market value at March 1, 1913, of the grave lots sold by the taxpayer during the taxable years 1926, 1927 and 1928 was ~~14.4~~ 23.96 cents a square foot.

2. The Board of Tax Appeals erred in holding and deciding that the fair market value at March 1, 1913 of the grave lots sold by the taxpayer during the taxable years 1926, 1927 and 1928 was 76.6 cents a square foot.

3. The Board of Tax Appeals erred in failing to find as a fact that based on the information available at March 1, 1913, the taxpayer had an expectancy of disposing of between 7,000 and 7,500 square feet of burial lots during the year 1913.

4. The Board of Tax Appeals erred in failing to find as a fact that it would take the taxpayer 75 years from March 1, 1913, to dispose of all of its burial lots in the improved portion of the cemetery.

5. The findings, determination and decision of the Board of Tax Appeals are contrary to the evidence.

6. The findings, determination and decision of the Board of Tax Appeals are not in accordance with the weight of the evidence.

7. The Board of Tax Appeals erred in not rendering judgment for the Commissioner in the amount of the deficiency for each of the taxable years involved for the reason that any other judgment is not supported by competent and substantial evidence nor according to law.

31 Whereupon, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, that a transcript of record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN,
Assistant Attorney General.
(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
E. A. TONJES,
Special Attorney,
Bureau of Internal Revenue.

32 United States of America, }
District of Columbia. } ss.

E. A. TONJES, being duly sworn, says that he is a Special Attorney in the Office of the Assistant General Counsel for the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) E. A. TONJES,

Sworn and subscribed to before me this first day of March, 1935.

My commission expires Nov. 16, 1937.

(Sgd) GEORGE W. KREIS,
Notary Public.

pr. 12, 48 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to July 2 1935.

(Signed) EUGENE BLACK,
Member.

Now Sept. 3 1935, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Dated, Washington, D. C., April 12, 1935.

une 20, 47 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to September 3, 1935.

(Signed) EUGENE BLACK,
Member.

Now Sept. 3 1935, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Dated: Wash. D. C., June 20, 1935.

46 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to Sept. 9, 1935.

(Signed) EUGENE BLACK,
Member.

Now Sept. 3 1935, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Dated: Washington, D. C., Aug. 31, 1935.

43 IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Filed A 1935.

* * (Caption—58813) * *

PRAECIPE OF RECORD.

Filed Aug. 19, 1935.

United States Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitle cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket series of the proceedings before the Board.
2. (a) Petition.
(b) Answer.
(c) Motion for Additional Findings of fact and to Modify Decision.
(d) Motion to Have Order Denying Motion for Additional

Findings of Fact and to Modify Decision, Reviewed by the Full Board.

(e) Order Denying Board Review.

3. Copy of Notice of Deficiency filed at hearing.

4. Memorandum opinion and decision.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

44 6. Statement of the evidence as settled and allowed.

7. Orders enlarging time for the preparation of the evidence and for the transmittal and delivery of the record.

8. This praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 17th day of August, 1935.

(Sgd) LAWRENCE GROVES,
Attorney for Respondent.

45 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 44, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 3rd day of Sept., 1935.

B. D. GAMBLE,
(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 34, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-sixth day of September, 1935, upon which the following entitled cause was heard and determined:

Commissioner of Internal Revenue,
Petitioner,

vs.

The Elmhurst Cemetery Company of Joliet,
Respondent.

No. 5617, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of June, A. D. 1936.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court, in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

Commissioner of Internal Revenue,
Petitioner,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet,
Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals.

And afterwards, to-wit: On the fourteenth day of February, 1936, the following further proceedings were had and entered of record, to-wit:

Friday, February 14, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Philip L. Sullivan, District Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Howard P. Locke, counsel for petitioner, and by Mr. Elden McFarland, counsel for respondent, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the seventeenth day of March, 1936, there was filed in the office of the Clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 5617. OCTOBER TERM, 1935, JANUARY SESSION, 1936.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
THE ELMHURST CEMETERY COMPANY OF JOLIET,
Respondent.

Petition for Review of Decision of United States Board of Tax Appeals.

March 17, 1936.

Before EVANS and SPARKS, *Circuit Judges*, and SULLIVAN, *District Judge*.

This appeal involves respondent's income taxes for the years 1926, 1927, and 1928. Controversy is over the value of vacant cemetery lots on March 1, 1913. The Commissioner fixed the value at 23.96 cents per square foot. The taxpayer appealed, and the Board of Tax Appeals determined the value at 76.6 cents per square foot. The Commissioner appealed.

EVANS, *Circuit Judge*. Does the evidence support the finding of the Board of Tax Appeals that lots in respondent's cemetery were worth 76.6 cents per square foot on March 1, 1913? If so, we must affirm.

The facts. Appellant was organized in 1909. It purchased 137 acres of land near Joliet for $60,000 and improved 37

acres of it at a cost of $35,000. From this improved acreage it sold lots as follows:

1909	7,308.55 sq. ft. at 73c	per sq. ft.
1910	7,005.55 sq. ft. at 71.5c	per sq. ft.
1911	7,312.20 sq. ft. at 70.2c	per sq. ft.
1912	6,320.20 sq. ft. at 77.6c	per sq. ft.
1913	8,506.10 sq. ft. at 79.5c	per sq. ft.
Total	36,452.60 sq. ft. at 74.36c	per sq. ft.

The superintendent of respondent was the only witness. All other facts were stipulated. The superintendent estimated that it would take seventy-five years to dispose of all of the property as and for cemetery lots. He testified the average price at which lots were sold the year immediately preceding March 1, 1913, was 76.6 cents per square foot. In the years 1926, 1927, and 1928, the footage sold and prices received were as follows:

1926	14,939.9 sq. ft. at	$1.55
1927	10,979 sq. ft. at	1.66
1928	17,077.5 sq. ft. at	1.77

The Board accepted the selling price of lots for the year previous as the basis of its determination of fair value. Petitioner urges that such selling price should be discounted because of the years required to dispose of the entire tract.

While selling price is often a satisfactory way of determining value, it is not always so. *Heiner* v. *Crosby*, 24 F. (2d) 191 (CCA 3d); *Chicago Ry. Equipment Co.* v. *Blair*, 20 F. (2d) 10, 13 (CCA 7th). A purchaser of an unimproved quarter section of land in Northern Wisconsin, for example, might have 200,000 evergreen trees suitable for Christmas use on his tract, and his offer to sell them to whomsoever would come and cut and carry them away for 25 cents each was accepted by one hundred persons in a single year. It would hardly be claimed that the 200,000 trees as they stood on the land were worth $50,000, especially if it be shown that the land was purchased the year before at $10 per acre.

The land here in question cost respondent $440 per acre in 1909. The Board, four years later, in 1913, fixed its value at $32,000 per acre. Differently stated, the cost price in 1909 was 1.1 cents per square foot. Its value in 1913 was fixed at 76.6 cents per square foot. The extraordinary rise must have been due solely to the change in its use for there was no evidence of rise in the value of land around Joliet from 1909 to 1913.

To emphasize the weakness of selling price in certain cases,

take another illustration. Assume the change from farm acreage to cemetery lots occurred January 1, 1913, and 5,000 square feet of lots had been sold at 76 cents per square foot during the two months following organization. Assume further that the cost on January 1 was one cent per square foot. Would the lot selling price completely overcome the evidence furnished by the purchase price three months earlier?

We think the facts in this case necessitate the rejection of the selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price. We do not say that in all cases and under all circumstances such basis should be used in determining the 1913 value of cemetery lots. Various factors, such as age of cemetery, location, the existence of other cemeteries, and cemetery sites and many other matters, should be considered. An impartial view would be, we think, that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price.

The statute provided that the cost of the property or "the fair market value of such property as of March 1, 1913, whichever is greater" shall be used in determining income. The Commissioner did not limit the taxpayer to cost price but fixed a market value well in excess of that figure. The burden was upon respondent to show this valuation was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the case before us.

Our conclusion is that the Commissioner was liberal with the taxpayer. It should be noted that fair market value is the alternative to cost price. If the circumstances make evidence of fair market value impossible or not obtainable or so uncertain and unsatisfactory as to render any finding thereon purely speculative, then the cost price must be used. Obviously, the respondent cannot complain when the Commissioner, under such circumstances, fixes a valuation which is much higher than cost price.

The order of the Board of Tax Appeals is reversed with directions to affirm the determination of the Commissioner.

Endorsed: Filed April 1, 1936. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the seventeenth day of March, 1936, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 17, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Philip L. Sullivan, District Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the Decision entered in this cause on December 5, 1934, by the United States Board of Tax Appeals be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to affirm the determination of the Commissioner.

And afterwards, to-wit: On the sixth day of April, 1936, there was filed in the Office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the fifteenth day of April, 1936, there was filed in the office of the Clerk of this court, an Answer to the Petition for a Rehearing, which said Answer is not copied here.

And afterwards, to-wit: On twenty-first day of May, 1936, the following further proceedings were had and entered of record, to-wit:

Thursday, May 21, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Philip L. Sullivan, District Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-eighth day of May, 1936, the following further proceedings were had and entered of record, to-wit:

Thursday, May 28, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day comes counsel for respondent and presents a motion to stay the Mandate of this court pending a petition to the Supreme Court of the United States for a writ of certiorari.

On Consideration Whereof: It is now here ordered that

the Mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for respondent proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States, and forthwith file in this court proof of the filing of said petition in said court.

And on the same day, to-wit: On the twenty-eighth day of May, 1936, there was filed in the office of the Clerk of this court, a Praecipe for Record, which said Praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
The Elmhurst Cemetery Company of Joliet,
Respondent.
No. 5617.

PRAECIPE FOR RECORD.

To the Clerk of the U. S. Circuit Court of Appeals for the Seventh Circuit:

Will you please prepare a certified transcript of the record in the above-entitled cause together with copies thereof for filing with the Clerk of the Supreme Court of the United States, in connection with respondent's petition for certiorari, including therein:

1. The record before the above-entitled Court on petition for review.

2. The following proceedings before said United States Circuit Court of Appeals for the Seventh Circuit:

(a) Reference to argument and submission;
(b) Opinion;
(c) Judgment;
(d) Reference to filing petition for rehearing;
(e) Reference to filing answer to petition for rehearing;

(f) Order denying rehearing;
(g) Order staying mandate.

ELDEN MCFARLAND,
Attorney for Respondent.

The foregoing praecipe is satisfactory to the petitioner.

ROBERT H. JACKSON,
Assistant Attorney General,
Attorney for Petitioner.

Endorsed: Filed May 28, 1936. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 37 to 44, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Praecipe filed on the twenty-eighth day of May, 1936, (excepting Item I of said Praecipe, being the printed record, which is certified under a separate certificate); in the case of

Commissioner of Internal Revenue,
Petitioner,

vs.

The Elmhurst Cemetery Company of Joliet,
Respondent.

No. 5617, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of June, A. D. 1936.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.